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Nos. 90-453 and 90-466

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RORY DOREMUS (No. 90-453),
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.
and
DAVID DOREMUS (No. 90-466),
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF WESTERN MINING COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE WESTERN MINING COUNCIL, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI

The Western Mining Council, Inc., files this brief as amicus curiae in support of the Petitioners' request for

a Writ of Certiorari. Consent to file the brief has been obtained from the attorney for Petitioner Rory Doremus, from Petitioner David Doremus, and from the attorneys for Respondent United States of America.

INTEREST OF AMICUS CURIAE.

The Western Mining Council, Inc., is a California non-profit corporation representing United States citizens who conduct mineral exploration and mineral development on the public lands of the United States, including on public land in the National Forests. The members of the Western Mining Council are some of the thousands of American citizens who explore for minerals and develop mines in the vast and largely unexplored forests, mountains and deserts of the Western United States. The Western Mining Council includes many individuals, small businesses, smaller companies (less than

50 employees), and many family or "mom-and-pop" mineral exploration and development businesses.

The Western Mining Council is concerned with the acts of unfair and unlawful discrimination against mineral prospectors and developers on public land, including tactics of the United States Forest Service ("Forest Service") specifically directed against thousands of small businesses and mineral development businesses. These tactics include the Forest Service's aggressive and wrongful enforcement of inapplicable criminal laws, the issuance of wrongful criminal citations against mineral developers and the imposition of unreasonable restrictions and conditions on operating plans and permits to do mineral prospecting and mining in the National Forests. The purpose of this brief as amicus curiae is to discuss how

the issues in this case and the Forest Service's continuing unreasonable activities are devastating and destroying the mineral exploration and development industry in the United States, to the detriment of the miners, the local economies, small businesses, and which are seriously detrimental to the productivity and security of the United States of America. The Forest Service is seriously inhibiting mineral exploration and development in the United States at a time when this country critically needs to encourage mineral development and production and to encourage small business generally.

The Western Mining Council respectfully requests that this Court, in rendering their opinion and in reviewing the Petitioners' convictions for removing trees from their valid mining claims, clarify the right of private

mineral developers relative to plans of operations without the necessity of a separate permit or plan amendment for each necessary act or for each tree which the miner finds reasonably necessary to remove, and confirm the inapplicability of certain criminal laws in the National Forests.

The existing Forest Service policy of aggressive issuance of citations for minor criminal offenses against miners in the National Forests, and the application of arbitrary criteria for "conditions" on operating plans imposed upon miners by local officers of the Forest Service, have created ambiguity, disputes and abuse by local Forest Service officers. Examples of such ambiguity and disputes are the instant case and the multitudes of other cases of petty offense violations and disputes over plan of operation conditions,

including those examples referred to in the opinions in **United States v. Craig**, CR-82-8-H (D.C. Mont 1984), in **United States v. Patrin**, Civil No. 1-72-135 (D.C. Idaho 1974), in the facts in the case reported by the court in **United States v. Weiss**, 642 F.2d 296 (9th Cir. 1981), in the facts in other cases cited in the briefs of both Petitioners in this petition, and, thousands of unreported field incidents. For these reasons, this court's review is needed, and the Western Mining Council submits this brief in support of the Petitioners' request for a writ of certiorari.

A WRIT OF CERTIORARI SHOULD BE GRANTED.

A. PETITIONERS' CONVICTIONS ARE UNCONSTITUTIONAL BECAUSE THEY ARE UNSUPPORTED BY LAW OR EVIDENCE, AND PETITIONERS' ACTS WERE AUTHORIZED UNDER THE MINING LAW.

The government's hearing evidence

before the U.S. Magistrate did not meet the burden of proof that the Petitioners' activities were unreasonable and unnecessary to the operation of their valid unpatented mining claims. The evidence did not show any illegal activity by either defendant, and the evidence showed that the acts of the Forest Officers were unjustified and illegal.

The mining claims of the Petitioners were valid, and the validity is not an issue here. These unpatented mining claims were being developed under the specific provisions of the General Mining Law (30 U.S.C. §21, et seq., as amended). The rights of individuals under the Mining Law have been specifically reaffirmed by Congress many times, notably including reaffirmation in 1955 in 30 U.S.C. § 612, in 1970 in 30 U.S.C. § 21(a), in 1976 in 43 U.S.C.

§ 1732, and in 1980 in 30 U.S.C. § 1601. The Forest Service regulations themselves specifically provide that "...[n]othing in [36 C.F.R. § 261] shall preclude activities as authorized by ... the U.S. Mining Laws Act of 1872, as amended."

The activities of the Petitioners were authorized by the Mining Law and by numerous judicial reaffirmations thereof, as established in the express holding in **U.S. v. Caruthers**, 523 F.2d 1306 (9th Cir. 1975), that the statutory authority granted to the owner of a mining claim under 30 U.S.C. § 612, precluded the owner's criminal conviction for the removal of trees from his claim. The activities of the instant Petitioners were also authorized under the Forest Service regulations themselves. Since the Petitioners' activities were not shown to be un-

reasonable or illegal, the Petitioners cannot be prosecuted for these acts.

The Court of Appeals upheld the instant criminal convictions based upon Petitioners' alleged violations of 36 C.F.R. §§ 261.9(a) and 261.10(k), which prohibit "...[d]amaging any natural feature or other property of the United States" (36 C.F.R. § 261.9(a)), and "...[v]iolating any term or condition of ...[an] approved operating plan." (36 C.F.R. § 261.10(k)). Petitioners' convictions under 36 C.F.R. §§ 261.9(a) and 261.10(k) conflict with, and are specifically preempted by, 36 C.F.R. §§ 261.1(b), 261.6(a), 261.6(b), 261.9(a), and 30 U.S.C § 612. 36 C.F.R. §261.1(b) provides that "... [n]othing in this part [i.e., 36 C.F.R. §261] shall preclude activities authorized by ... the U.S. Mining Laws Act of 1872 as amended." 30 U.S.C § 612(a) prohibits

removal of vegetation "... [e]xcept to the extent required for mining claimant's prospecting, mining, or processing operations and uses reasonably incident thereto, ... or to provide clearance for such operations or use." So, contained within 36 C.F.R. § 261 is the specific authority that any conflicting provisions of § 261 will be preempted by the Mining Law.

The court in U.S. v. Weiss, supra, at 299, stated that 36 C.F.R § 261.1(b) is a recognition that mining operations "... may not be prohibited nor unreasonably circumscribed as to amount to a prohibition." That acknowledgement clearly establishes the supremacy of the General Mining Law's provisions over the restrictive and conflicting prohibitions contained in the regulation in 36 C.F.R. §§ 261.9(a) and 261.10(k).

B. THE LAWS AND FOREST SERVICE REGULATIONS WERE APPLIED IN AN ARBITRARY AND DISCRIMINATORY MANNER IN THIS CASE.

Petitioners' convictions are unconstitutional in that the Forest Service, in issuing Petitioners a criminal citation, applied its regulations in an arbitrary and discriminatory manner in violation of the doctrine of equal protection of the laws under the United States Constitution. The long line of cases of illegal government discrimination based upon race is useful in analyzing the instant case. In an early discrimination case, **Yick Wo v. Hopkins**, 118 U.S. 356 (1886), the Supreme Court invalidated a San Francisco city ordinance which allowed the rejection of a permit for Yick Wo to operate a laundry in a building not constructed of brick or stone, where the authorities approved laundry permits for non-Chinese persons

to operate in such buildings while rejecting all applications by Chinese. The court reasoned that "... the idea that any man's livelihood depends upon the mere will of another is the essence of slavery ... [if the disapproval be administered] with an evil eye and an Unequal Hand ...", and that such would be an unconstitutional denial of equal justice.

The Yick Wo and the instant Doremus cases are analogous in that, while not racially motivated, the Forest Service in the instant case is arbitrarily, intentionally and unlawfully preventing particular persons, i.e., mineral prospectors and developers, from validly exercising their rights under the Mining Law and the U.S. Constitution. The Forest Service's issuance of arbitrary citations and their placing of unjustified "conditions" upon miners'

operating plan "approvals" under 36 C.F.R. § 261.1(a), are nothing more than arbitrary de facto denials of citizens' rights to conduct good faith mineral exploration and mining in the National Forests. The preventing of the Petitioners from operating on their valid mining claims in the National Forest by the means of criminal citations for alleged petty offenses and by unreasonable operating "conditions" is somewhat more sophisticated that the denial of Yick Wo's laundry permit, but each is a wrongful deprivation of rights by a government agency. The instant Doremus case demonstrates most clearly the arbitrary and unconstitutional discrimination against mineral prospectors and miners in the National Forests, particularly in view of the specific mandate in its own Forest Service Manual (§§ 2814.21 and 2814.24) to "... respect

[mining] claims and claimants' property ..." and to provide to "... prospectors and miners operating plan provisions in order that they may carry out necessary mineral associated activities." The express Forest Service policies are set out in the United States Forest Service Manual, in the regulations and in the statues, including the following:

> "The right of reasonable access for purposes of prospecting, locating and mining is provided by statute." Forest Service Manual, § 2813.14;
>
> "The Forest Service must respect claims and claimants' property by using precautions to avoid damage to claim corner markers, excavations, and other mining and improvements." Forest Service Manual, § 2814.21;
>
> "Forest officers should provide bona fide prospectors and miners reasonable alternative access routes, exploration methods, special use permits, and operating plan provisions in order that they [i.e., the prospectors and miners] may carry out necessary mineral associated activities without violation of laws and regulations." Forest Service Man-

ual, § 2814.24;

"Nothing in 36 C.F.R. § 261 shall preclude activities as authorized by the Wilderness Act of 1964 or the U.S. Mining Laws Act of 1872, as amended," 36 C.F.R. § 261.1(b).

These statements of law and policy are very clear and unequivocal, and must be held to override the arbitrary "unwritten" power of local Forest Service officers to issue arbitrary citations or to attach unworkable or unreasonable conditions to the "approval" of a miner's otherwise reasonable plan of operations under the purported authority of 36 C.F.R. § 261.1(a).

The local Forest Officer has been given the power to "approve" the miner's plan of operations, or to "... place such conditions on the authorization as the officer considers necessary for the protection or administration of the National Forest System, or for the promotion of public health, safety or

welfare." 36 C.F.R. § 261.1(a).

The authority of a Forest Service officer to determine whether a specific activity is "... damaging any natural features" or "... violating any term or condition of ... [an] approved operating plan ..." under 36 C.F.R. § 261.1 (a) was clearly too broad and vague on its face to be reasonable or workable. In the instant case, the direct and immediate effect of the "conditions" imposed upon the Doremus brothers by the Forest Officer under the authority of 36 C.F.R. § 261.1(a) was to deprive the Doremus brothers of their chosen livelihood of reasonably developing unpatented mining claims in the National Forest. As set out in the trial transcript, and as is patently obvious, although technically "possible," it is not reasonably feasible for a miner to stop all mining

operations in order to reapply for a plan amendment each time it becomes reasonably necessary to cut down an unanticipated tree or to dig another reasonable trench. To impose such a requirement on miners would frustrate mining operations to such a degree as to make them economically prohibitive, and such a requirement would terminate many legitimate mineral exploration and development operations--a result which the Forest Service regulations, public policy, common-sense national survival instinct and the U.S. Constitution specifically forbid.

This court's reversal of the two Petitioners' erroneous convictions in this case would partially alleviate the Doremus brothers' current impediment to carrying on their livelihood as virtually the last remaining miners in the Nez Perce National Forest in Idaho.

However, the Western Mining Council is gravely concerned that the rights of the Doremus brothers, and of all other mineral developers in the National Forests in the United States, are seriously endangered, and that these rights should be clarified relative to a citizen's right to prospect and mine in a National Forest under the Mining Law, specifically including a miner's right to legally cut some trees in the reasonable development of his mining claim.

The Western Mining Council hereby respectfully requests that this Court, in granting certiorari and in accepting in this case, specifically delineate reasonable criteria which apply to the facts in this instant Doremus case, as well as to other mineral prospectors and miners, relative to their rights to prospect and mine in National Forests under the Mining Law, free from unlawful

restriction. This Court should define and delineate the limited permissible scope of Forest Service control over mineral exploration and development in National Forests; and the result would be guidelines obviating many detrimental and economically fatal delays and difficulties such as those experienced by the Petitioners in the instant case, and by many others.

The Forest Service "petty offense violation" procedures, when combined with other tactics as set out in the hearing transcript in this case, clearly show the potential and actual abuse and "arbitrariness," particularly when the same Forest Service officer who administers and writes up the "plan conditions" also writes the citations.

Many federal administrative agencies "administer" all three functions of government (executive, legislative and

judicial) within the province of the tasks delegated to them by Congress. However, the opportunity for arbitrary action, and specific instances of abuse, must be fully considered when reviewing such a broad "sub-sub-delegation" of power as the instant regulations empowering the local Forest Service officer to issue citations, and, also, to "place such conditions" on his approval of the operating plan as "the officer considers necessary for the protection or administration of the National Forest System, or for the promotion of public health, safety, or welfare." (36 C.F.R. § 261.1(a)).

If a Forest Service officer chose to prohibit all mineral exploration and development in "his" National Forest, it would be, and is, all too easy for him to do so by issuing citations for alleged petty offenses, and by imposing

difficult plan conditions under the overly broad and vague delegation of multiple powers to Forest Service officers under 36 C.F.R. § 261.1(a).

The instant case cries out for clarification of the scope of Forest Service authority to arbitrarily deny to mineral developers the reasonable freedom of activity upon which their livelihood depends; and this case is just such an opportunity for this Court.

C. THE ISSUES PRESENTED HEREIN ARE OF CRITICAL IMPORTANCE TO MINERAL EXPLORATION AND DEVELOPMENT IN THIS COUNTRY AND TO THE PRODUCTIVITY AND SECURITY OF THE UNITED STATES.

The significance of the issues presented herein cannot be minimized at a time when this country's future prosperity, economic well-being and military security rest so squarely on our ability to continue to efficiently explore for and supply minerals to our country.

The primary source of minerals in the United States is the public lands which are open for mineral exploration and development. This country depends upon our incentive-based Mining Law to motivate citizens to explore for minerals, to develop mining operations and to provide the United States with a reliable continuous flow of minerals for industrial, commercial and military uses.

If mineral development is further impeded in the United States, the result will be the loss of future discoveries and development of those minerals vital to the productivity and security of this country. Forest Service practices have already terminated most mineral exploration and development in National Forests by issuing "fatal" criminal citations for alleged minor offenses and by placing overly restrictive conditions on

plans of operation. The Forest Service has effectively eliminated thousands of mineral development operations on our public lands, including those of the Doremus brothers, who had maintained "virtually the last of the operating mine in the Nez Perce National Forest in Idaho." The instant case is an example of arbitrary over-regulation of mineral development through the use of unjustified criminal citations and unreasonably restrictive conditions on plans of operation. These violations of the express mandate of the Mining Law, and the express letter and spirit of the Forest Service Manual, have "thrown out" large numbers of mineral developers and miners from public land in the National Forests.

Our National Forests do not "belong to" the Forest Service, they are public land open to mineral exploration by U.S.

citizens under the Mining Law. Because the Forest Service literally "loses control" of the land when minerals are discovered, a "turf war" results when a mineral developer seeks a Forest Service permit, because the Forest Service controls only the land surface, and want to "keep" control. The result is not only a "chilling" effect, but the absolute destruction of a large majority of the legitimate mineral developments on "Forest Service" land, causing a substantial reduction of mineral exploration and development in the United States.

It is essential to the security and productivity of the United States that we maintain and increase our mineral exploration and development in this country in order to prevent the United States from becoming dependent upon and subservient to foreign sources for

minerals.

Despite the expressly stated U.S. policy of encouraging mineral exploration and development, recent substantial decreases in mineral development has resulted in the loss of thousands of jobs and small businesses, which have been "exported" overseas. Foreign nations are more than anxious to develop their own mineral resources and to sell their minerals to the United States. In September 1990 Mexico dropped their "51% Mexican ownership" requirement to encourage their own mineral development, and now allows 100% non-Mexican ownership of mineral operations.

Vigorous recent foreign mineral development combined with obstructive U.S. governmental actions is resulting in the following devastating long-term detrimental effects and costs to the United States and to its citizens:

Cost #1--Dependence Upon Foreign Sources for Minerals. Probably the most serious effect of the devastation of the U.S. mineral exploration and development industry is the increased dependence of the United States upon, and subservience to, unreliable and unpredictable foreign sources for essential minerals and rare earths indispensable to maintaining our dominant position in military hardware, space technology, nuclear fusion and superconductivity. We cannot fault Mexico developing their minerals. Rather, we should seek to decrease our own dependence upon and our potential subservience to foreign sources for essential minerals from South Africa, the Soviet Union, Mexico and, recently, even from Mongolia and Vietnam. No dollar value can be placed upon the U.S. retaining its position as the world leader in high technology research,

security and national defense. The list of affected minerals is long and varied, including: Iron ore, rare earths, rhodium, palladium, other platinum group metals, precious metals, talc, titanium, chromium, and others.

Cost #2 -- Increased Prices of Minerals. Dependence upon foreign mineral sources will result in the increased cost of many essential minerals and rare earths, with prices continuing to rise because of the disappearance of the supplies and identified future sources of these minerals from the United States public lands. The U.S. will then be subject to the uncertainties of unreliable foreign sources and cartels for many essential, critical and strategic minerals, just as we were in the oil "shortage" of the 1970's, and as we are today dependent upon South Africa and the Soviets for

virtually all of our chromium and rhodium. The price of rhodium has skyrocketed from $1,300/ounce in November 1989 to $6,000-$7,000/ounce today, and is expected to rise even more soon.

Cost #3--Fifth Amendment "Takings". Many of the restrictions and regulations which destroy and close down mineral development operations in the United States have resulted in compensable takings under the Fifth Amendment. Executive Order No. 12630 (Fed. Register, March 16, 1988), as reissued by President Bush in 1990, requires that all federal agencies provide a specific written Taking Implication Assessment ("TIA") on the effect of agency regulations and decisions on the taking of private property, explicitly identifying and including "regulatory takings" as compensable. This court has specifically held that it "... is established

by innumerable decisions of this court and of state and lower courts that ...a mining claim ... is property in the fullest sense of that term." (**Wilbur v. United States ex rel. Krushnic**, 280 U.S. 306, 316 (1930)). The courts fully recognize the compensability of takings and "regulatory takings," as was aggressively reaffirmed by the recent line of cases starting with the two June 1987 decisions **First Evangelical Church of Glendale v. County of Los Angeles**, 482 U.S. 384 (1987) and **Nollan v. California Coastal Commission**, 483 U.S. 825 (1987). It is clear that the United States or a state can take any property it chooses for a public use; but, "...private property may not be taken for public use without just compensation." (U.S. Const. amend. V.) So, we have the resultant critical dual reasons why mining claims should not be restricted and be taken,

i.e., these takings will cost the taxpayers many billions of dollars, and, secondly, the mineral exploration, development and productivity of the United States will be seriously hurt.

Cost #4--Non-Compensable Losses and Homelessness. Thousands of American jobs have already been lost and persons made homeless by arbitrary restrictions placed upon mineral exploration and development. Particularly hard hit are U.S. small businesses, independent family mining businesses, mineral development companies, related service and support businesses, and, of course, the thousands of future prospective mineral exploration and development businesses. Most of these private future losses of businesses, income and property will be non-compensable takings.

Absent effective and continuing mineral exploration and development the

United States will be faced with the following: Subservience to foreign sources for essential minerals; higher mineral prices; greater world-wide environmental pollution due to minimal foreign environmental controls and millions of gallons of diesel fuel used in shipping foreign minerals for ultimate consumption in the United States; billions of dollars of takings and "regulatory taking" of mining operations; decreased U.S. productivity and G.N.P.; decreased U.S. security resulting from dependence upon foreign sources for essential minerals; and an increased U.S. trade deficit resulting from buying foreign minerals while ours lie "fallow" on U.S. public lands. This country's vitality and world leadership position can only be maintained by adhering to the established public policies of encouraging and assisting mineral

exploration and development and by prohibiting the disabling practices and arbitrary actions of governmental agencies, specifically including the actions of the Forest Service in the instant Doremus case.

CONCLUSION

The Petitioners' criminal convictions, although seemingly simple and isolated, could have a profound and lasting effect upon the United States. Just as freedom of speech is chilled by each act of censorship, so the productivity of this country is quelled by acts which interfere with the citizens' rights to explore for minerals under the incentive-based Mining Law.

On behalf of those persons who choose mineral exploration and development on public land as their livelihood, including the Petitioners, the Western Mining Council respectfully requests and

implores this court to grant certiorari in this case, to provide an opportunity to clarify the validity of Forest Service practices of imposing arbitrary repressive conditions on plans of operation and of issuing unjustified criminal citations. This court should consider the strong public policy, and the specifically stated legislative policy, of encouraging mineral exploration and development on U.S. public lands.

This instant Doremus case cries out for Court direction to stop the misuse of bureaucratic devices which "chill" and destroy legitimate and desperately needed United States mineral exploration and development. This case demonstrates the need for a more detailed specification of the requirement that the Forest Service respect and encourage mineral development in the National

Forests.

The Petition for Writ of Certiorari should be granted, and the judgments and rulings below should be reversed.

Thank you for allowing the Western Mining Council to present its views and arguments on behalf of granting a writ of certiorari as requested by Petitioners Doremus in this matter.

Respectfully submitted,

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